In The

SUPREME COURT OF THE UNITED STATES

No.

JOHN R. ROGERS,
Plaintiff in Error,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant in Error.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

LOUIS B. FINE and
HOWARD I. LEGUM
Attorneys for Petitioner

FINE, LEGUM & SCHWAN
Law Building
Norfolk 10, Virginia
Counsel

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Petitioner, John R. Rogers, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered in the above entitled case on January 11, 1961.

OPINIONS BELOW

No opinions were rendered either by the Court of Law and Chancery of the City of Norfolk, Virginia, or the Supreme Court of Appeals of Virginia.

JURISDICTION

The judgment of the Court of Law and Chancery of the City of Norfolk, Virginia, was entered on August 9, 1960. The petition for a writ of error was denied on January 11, 1961. There was no order respecting a rehearing. There was no order granting an extension of time within which to petition for certiorari. Petitioner has no further appellate remedy under the laws of the State of Virginia. The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1257 (3).

QUESTION PRESENTED

Whether the trial court erred in granting the motion of the Norfolk and Western Railway Company to strike petitioner's evidence and entering summary judgment for the railway company without permitting the jury to pass upon the merits of petitioner's case under the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, et seq.

STATUTE INVOLVED

The Statute involved is the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by

such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY OF THE CASE:

Petitioner filed a motion for judgment in two counts to recover damages for personal injuries. Count I was brought pursuant to 45 U.S.C.A., Sec. 51, et seq., known as the Federal Employers' Liability Act and alleged that his injuries resulted in whole or in part from the negligence of the Railroad. Count II alleged that his injuries were

due to the negligence of an employee of the Norfolk and Western Railway Company named Joseph Eugene Coleman acting within the scope of his employment with the Railroad and asked for damages from both Coleman and the Railroad.

The case was tried before a jury commencing August 8, 1960. On August 9, 1960, after the petitioner had completed his evidence, the trial court sustained the motion of the Railroad to strike petitioner's evidence and entered summary judgment in favor of the Railroad. Petitioner duly excepted. On August 10, 1960 the jury returned a verdict in favor of the defendant Coleman and judgment was entered on the verdict after the court had overruled petitioner's motion to set aside the verdict and award a new trial. Exception was duly taken. Thereafter petitioner filed a petition for a writ of error to the final judgments to the Supreme Court of Appeals of Virginia which denied the appeal.

II. THE FACTS MATERIAL TO THE QUESTION PRESENTED:

Petitioner, a 40 year old family man (Tr. 11, 12), had been employed by the Norfolk and Western Railway Company since April, 1951 (Tr. 12). He started as a "section laborer" and was afterward promoted to "car repair helper" which was the position he held with the Railroad on the date of the accident, October 1, 1957 (Tr. 12). For this, he was paid a wage of $2.20 per hour for a 40 hour week and occasionally received overtime pay at $3.30 per hour (Tr. 64).

It was stipulated that the Norfolk and Western Railway Company was a common carrier engaged in interstate commerce (Tr. 15-16).

Petitioner testified that his working day began at 7:00 A.M., and ended at 3:30 (Tr. 29). The Railroad employees were allowed 30 minutes for lunch beginning at Noon and they were supposed to be back on the job at 12:30 (Tr. 29-30).

On the day of the accident, October 1, 1957, petitioner brought his lunch with him and, as he had regularly done every working day since he had been working in Norfolk, which was since August 4, 1955, he took his lunch to the "air house" in order to eat there (Tr. 30, 63). Other employees of the Railroad also ate in the air house and there was no one who ate there who was not an employee of the Railroad (Tr. 30). Around 16 or 18, perhaps 20 people would usually come in and eat their lunch in the air house (Tr. 32).

Petitioner suffered his injuries in the air house (Tr. 22), and pictures of both the outside (Plf.'s Ex. 1, 2 and 3; Tr. 23) and the inside (Plf.'s Ex. 5; Tr. 29) of the air house were introduced into evidence. The air house is "about 14 x 14" (Tr. 24, 31), and has about 6 windows (Tr. 31). As of the time of the accident, the Railroad furnished its employees 3 or 4 little benches and one long bench. The rest of the men had to sit on the floor (Tr. 31). Due to the lack of benches, this resulted in "seven or eight" of the employees having to sit on the floor when they ate their lunch (Tr. 31). The condition of people having to sit on the floor to eat their lunch had existed during the entire time of petitioner's employment with

the Railroad in Norfolk, which was since 1955 (Tr. 31-32, 63).

The air house, and all stools and other equipment therein belonged to the Railroad (Tr. 62). The Railroad had never told petitioner or any other employee not to eat in the air house (Tr. 63).

Petitioner further testified that while he could also go to eat in the "storehouse" which was "connected with the air house", there was only one chair in the storehouse and one Bass, who was "the storekeeper", sat in it all the time (Tr. 32).

There was a restaurant on the yard but it was half a mile from the shop "and then you have got about five railroad tracks to cross to get up there. A train could stop you either going or coming." (Tr. 32). Moreover, the restaurant was busy between 12:00 and 12:30 (Tr. 32). It was not possible to go to the restaurant and get back to work on time "unless you would go in your own car; and you were so dirty, you couldn't sit down in it without taking a bath before you went." (Tr. 33).

The foremen ate in the "foremen's house" which "had chairs all around" (Tr. 138).

With regard to eating on the outside, petitioner testified, "Well, if you eat out on the outside you would get your lunch full of coal cinders. They had these steam engines over there and they was running over there pretty much all the time." (Tr. 138).

Petitioner's Foreman and Assistant Car Foreman knew where the men ate (Tr. 136-137).

Petitioner further testified that on the day in question he went in the air house with his lunch in his hand (Tr. 33-34). There were "just a few people" in the air house at the time (Tr. 33). Petitioner described the happening of the accident in this language:

> ". . . I started to back up and sit down on the stool; and Coleman came in and jerked it out from under me while I had my dinner bucket in my right hand. And about the time I got down close enough to it, I knew it was gone and I missed it, and I throwed my hand down on the concrete floor and hurt it . . ." (Tr. 34).

His seat hit the concrete floor before his hand did (Tr. 132), and he hit the floor hard (Tr. 128, 132). After he fell in this fashion he went to take the stool from Coleman and it broke in two, with each man holding a part of it (Tr. 34, 39). His back started hurting right after this when he walked over to put down his lunch bucket in another place (Tr. 128, 132). The accident was reported to his Foreman the next day, and the Foreman gave him some medicine from a First Aid Kit (Tr. 34-35, 39).

The stool or bench involved was "about eight inches wide and about 16 inches high and maybe 18 inches long" (Tr. 36, 37). A small model of the stool was introduced into evidence (Plf.'s Ex. 6; Tr. 37).

The stool was "rickety" and therefore came apart easily when the two men pulled on it (Tr. 132).

Petitioner had not noticed that Coleman was going to take the stool away from him (Tr. 39). He had never had

any trouble with Coleman before, or even had any words with him prior to the incident (Tr. 38). There had been no horseplay prior to Coleman's pulling the stool from under him (Tr. 61). He ate lunch in the air house with Coleman most of the time (Tr. 132). The bench was not used by Coleman all of the time as "15 or 20" other people also used the bench at various times. Petitioner himself had used the stool or bench in question at different times and "I sat on it before I ever saw Coleman" (Tr. 122-123). Yet, as petitioner was getting up from the floor after his fall, with his dinner bucket in his right hand, Coleman said to him: "This is my bench. I sit on it every day." (Tr. 37-38, 126).

Petitioner further testified that on November 5, 1957 while he was in bed at home, Coleman came to his house and he heard Coleman tell his (petitioner's) wife that he (Coleman) was the man who jerked the stool from under him and caused him to fall and that he would pay his doctor's bill (Tr. 44-45, 46).

There was also introduced into evidence (Plf.'s Ex. 8, Tr. 91) a booklet containing the "Safety Rules" of the Railroad, which reads in part as follows:

> "1007. Scuffling, horseplay, practical jokes and all conduct of a similar nature is prohibited."
>
> "1305. When eating their lunches, employees should get back a safe distance from the track."

Officer W. F. Currie testified that he was a member of the Princess Anne County police force but had been employed by the Norfolk and Western Railway Company in 1957 as a car repair man (Tr. 143, 144). He was

familiar with the air house and had eaten there "maybe a couple of times" himself (Tr. 144). The air house was crowded (Tr. 146), and there were not enough chairs, after as many as 8 people were in there, "to accomodate all the people that wanted to eat in there" (Tr. 145, 147). The "chairs" used by the men were "benches" which the men used when they worked (Tr. 147).

Bobby R. McLane, testified that he was employed by the Railroad almost 3 years, from the latter part of 1956 through 1959, as a car repair man. He had never eaten in the air house himself but had seen people playing cards in there when "passing by" (Tr. 149). He testified that the restaurant is "about a half a mile from the air house, from the yard", and it was necessary to cross 5 railroad tracks to get to the restaurant (Tr. 150).

Charles N. Claywell testified that he was employed by the Fire Department of the City of Portsmouth but had been a car repairmen's helper with the Railroad from 1956 to 1959 (Tr. 151). There were a few small benches on which to sit in the air house, and there were work benches built around the wall (Tr. 152). People ate lunch in there during their lunchtime, but there were not enough chairs for the people in there (Tr. 152).

Ernest E. Stanley testified that he had been a car repair helper with the Railroad from 1955 to 1958 (Tr. 153), that people regularly ate their lunch in the air house during the time he was employed by the Raidroad, and that there were not enough seats (Tr. 154).

William D. Stocks testified that he was presently employed with the Railroad as a car repair helper, and had

been so employed since October 1, 1956 (Tr. 155). He also testified that there were not enough seats or benches for the men to sit on in the air house, which was crowded during lunchtime (Tr. 156). He further testified, but in the absence of the jury due to objections, that there were roaches in the locker room and that people who ate in there had to hang their lunch buckets from the ceiling by a wire, but that this was not true of the air house (Tr. 56, 227, 230).

Thomas E. Pickett a car repair helper with the Railroad since October, 1956 (Tr. 159) testified, also in the absence of the jury due to objections, that due to roaches in the locker room and storehouse food had to be hung up on a wire, but that there were no roaches in the air house (Tr. 159, 227, 231).

Helen Ruth Rogers, petitioner's wife, testified that when Coleman came to her house he said to her:

> "I am the fellow that jerked the stool out from under Slim [meaning petitioner] and caused him to get the fall and hurt his back." (Tr. 160-170).

Her husband then got out of bed and came in the room where she and Coleman were. Coleman said he was going to pay the doctors bills and "I don't have that much with me . . . but I will pay you" (Tr. 170).

At the conclusion of all of the above evidence which was adduced on behalf of the petitioner, the Railroad moved to strike petitioner's evidence and enter summary judgment for the Railroad. This motion was granted, the Court saying that there was "no proof of any negligence upon

which a liability could be fixed on the Norfolk and Western or which could support a jury verdict." (Tr. 267-269). Petitioner duly excepted.

Joseph Eugene Coleman, a 29 year old car repairer, who had been employed by the Railroad for 5 years, testified that he first became acquainted with the petitioner in August, 1955 when they were both employed in another place (Tr. 291). Up to the time of the accident, he only saw petitioner on an average of once or twice a week in connection with his work (Tr. 291-292). He was never a social acquaintance of the petitioner and never visited with him (Tr. 292). The work of a car repairer (Coleman's position) is the maintenance of freight cars, and a car repair helper (such as petitioner), assists the car repairer (Tr. 292-293).

On the day of the accident Coleman said he went into the air house at approximately 11:50 A.M., (Tr. 294). He did not have his lunch pail with him at the time he went in there, as he had left his lunch pail in the air house at 7:00 o'clock that morning. The air house was his customary and regular place for eating lunch (Tr. 294). The Railroad gave the men 30 minutes in which to eat their lunch. (Tr. 296).

He further testified that petitioner then came in and "picked up the stool that I usually sat on. I asked him for the stool." (Tr. 296). He testified that the model which had been introduced into evidence (Plf.'s Ex. 6; Tr. 27) is "roughly a model of the stool." (Tr. 306). He added that the thickness of the wood in the bench is one inch and that the bench is painted gray (Tr. 307). He claimed that he had been using the stool for the last two years prior to the accident every day he ate lunch (Tr. 307).

When he first saw petitioner, petitioner had the stool in one hand and his lunch bucket in the other. Coleman's lunch bucket was on one of the work benches where he had left it earlier that morning, and Coleman had nothing in either hand (Tr. 308). Coleman further testified that petitioner sat the stool down and that he (Coleman) grabbed it (Tr. 308-309). At this point, plaintiff "had ahold of the legs and I had the seat part, which I clamped on like this, and Mr. Rogers twisted the legs until they came off." (Tr. 318, 319). He said Rogers was standing at the time (Tr. 319).

Coleman denied that petitioner fell to the floor at any time (Tr. 319). There was no profanity used during or after the incident (Tr. 310). Coleman's foreman told him the following day that petitioner had turned him in (Tr. 312).

Coleman further testified that when he went to petitioner's house in November, 1957, Mrs. Rogers came to the door and he told her "I was the one that had the little incident with Mr. Rogers on the stool" (Tr. 314-315). Petitioner got out of bed and came in the room (Tr. 315). He asked plaintiff how he was feeling and petitioner told him he "wasn't feeling too good" (Tr. 316). Coleman said "And I told him that I would try to help him, that I didn't have much money but that I would try to help him." (Tr. 316). He explained his actions by stating it grew out of the natural sympathy of one working man for another (Tr. 317).

Coleman called two witnesses to testify on his behalf:

Rudolph Whitehurst testified that he was in the air house at the time of the accident, that Coleman asked

petitioner for the stool and petitioner would not give it to him, so Coleman picked it off of the floor and "they started a tussle over it and pulled it in two" (Tr. 324). He further testified that petitioner did not fall to the floor (Tr. 326), but on cross examination stated that the stool was on the floor when Coleman "grabbed" it and further:

"Q. So what was the plaintiff, Rogers, doing, when he grabbed the stool?

"A. Well, he was—he was getting ready to sit down." (Tr. 326).

Pete Eugene Morrot, the other witness called by Coleman, testified that he was facing one of the work benches along the wall of the air house when "I heard a scuffle and when I turned both men were standing on their feet struggling for the bench." (Tr. 328). The bench was pulled apart (Tr. 328). He did not see petitioner hit the floor (Tr. 329) but admitted that he did not know what happened prior to the time he heard the scuffle (Tr. 329).

Coleman then rested his case.

Petitioner, then returned to the witness stand and explained again that the two men pulled the bench apart *after* he fell (Tr. 330-331).

III. FEDERAL QUESTION RAISED BELOW IN TRIAL COURT AND BEFORE THE SUPREME COURT OF APPEALS OF VIRGINIA

(A) *In Trial Court:*

Count I, Paragraph 3, of the Motion for Judgment alleged "That this action arises under 45 U.S.C.A., Section 51."

The Grounds of Defense filed by Norfolk and Western Railway Company under Count 1, Paragraph 3, stated "It admits that this action was brought under 45 U.S.C.A., Sec. 51."

Count 1, Paragraph 1, of the Motion for Judgment alleged that on October 1, 1957 petitioner was employed by the Norfolk and Western Railway Company as a car repair helper and that the Railroad was a common carrier by railroad engaged in interstate commerce. This allegation was admitted by the Railway Company in its Grounds of Defense.

Paragraph 2, Count 1, of the Motion for Judgment alleged that on that date petitioner suffered injuries resulting in whole or in part from the negligence of the employees of the Railway Company and by reason of defects and insufficiencies due to the negligence of the Railway Company in its equipment, appliances and chairs in the air house where lunch was usually eaten by employees of the Railway Company.

The motion of the Railway Company to strike the evidence of petitioner was based upon the argument that petitioner had not proven a submissible case to the jury under the Federal Employers' Liability Act. In arguing against the motion, petitioner's counsel submitted a trial brief setting forth specific cases decided by this Court and Courts of Appeal that the evidence of petitioner was sufficient to present a jury question under the Federal Statute.

(B) *Before the Supreme Court of Appeals of Virginia.*

Under the rules governing petitions for a writ of error in the Supreme Court of Appeals of Virginia the plaintiff-

in-error had to file assignments of error and a petition for a writ of error. Assignment of Error 4 stated that the trial court erred in sustaining the motion of the Railway Company to strike petitioner's evidence. Assignment of Error 5 stated that the trial court erred in sustaining the motion of the railway company to enter summary judgment in its favor. Assignment of Error 6 stated that the trial court erred in entering judgment in favor of the Railway Company.

The petition for a writ of error filed with the Supreme Court of Appeals of Virginia set forth federal cases that it was error to strike the plaintiff's evidence under the Federal Employers' Liability Act.

The brief filed by the Railway Company in opposition to the petition for a writ of error confined itself solely to the question of whether or not the evidence was sufficient to present a jury question under the Federal Statute.

ARGUMENT

Certiorari should be granted in the instant case because the state court has decided a Federal question of substance in a way not in accord with applicable decisions of this Court.

It cannot be questioned that at the time of the accident petitioner was acting in the capacity of an employee of the Railroad and was entitled to the benefits of the Federal Employers' Liability Act. As was said in *Virginian Ry. Co. v. Early*, (4 Cir.) 130 F. 2d 548, 550-551 (Opinion per Soper, J.):

"It is conceded that the scope of employment includes not only actual service, but also those things necessarily incident thereto, such as going to and from the place of employment on the employer's premises. Erie R. R. Co. v. Winfield, 244 U.S. 170, 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662; Chicago, M., St. P. & P. R. Co. v. Kane, 9 Cir., 33 F. 2d 866; Atlantic Coast Line R. Co. v. Williams, 5 Cir., 284 F. 262; Easter v. Virginian Ry. Co., 76 W. Va. 383, 86 S.E. 37; Kinney v. Baltimore & O. Em. Rel. Ass'n, 35 W. Va. 385, 14 S.E. 8, 15 L.R.A. 142. It is also well established that a *temporary stoppage of work for purposes which are necessarily incident to the life of an employee* does not put an end to the relationship of employer and employee, since such an occurrence must have been within the contemplation of the parties. This rule has been applied to such ordinary circumstances as resting temporarily, procuring drinking water, *eating lunch on the premises*, &c. North Carolina R. R. Co. v. Zachary, 232 U.S. 248, 260, 34 S. Ct. 305, 58 L.Ed. 591, Ann. Cas. 1914C, 159; Chicago, M., St. P. & P. R. Co. v. Kane, 9 Cir., 33 F. 2d 866; 35 Am. Jur., Master & Servant, Sec. 172 and cases cited. . . ." (Emphasis Supplied).

Section 51 of the FELA, 45 U.S.C.A. Sec. 51, et seq., reads in part as follows:

"Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting *in whole or in part* from the negligence of

any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Emphasis Supplied).

It is well settled that although negligence still forms the basis for an action under the FELA, the duty of care imposed upon the employer is perceptibly higher than at common law. Moreover, it is uniformly held that the Act is to be liberally construed in favor of the employee. The reasons for this stricter duty stem from the necessity which brought the Act into being. As Mr. Justice Douglas observed in his concurring opinion in *Wilkerson* v. *McCarthy*, 336 US 53, 69 S Ct 413, 93 L ed 2d 497:

> "The [FELA] was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operation."

Any consideration of the question of the sufficiency of the proofs adduced on behalf of a railroad employee suing under the FELA to carry the case to the jury must of necessity start with the 1956 landmark decision of the United States Supreme Court in *Rogers* v. *Missouri Pacific R. Co.*, 352 US 500, 77 S Ct 443, 1 L ed 2d 493. In that case the petitioner railroad employee, who sued under the FELA, was engaged in burning weeds beside the railroad tracks with a hand torch. In accordance with his instructions, he "quit firing" when he heard a train whistle and went to a place on a path near a culvert. He was standing a few feet from the culvert when he become enveloped in

smoke and flames. He threw his arm over his face, retreated quickly back on the culvert and slipped and fell from the top of the culvert, thereby suffering the injuries for which he brought suit. A jury in the trial court had awarded him damages, and this was reversed by the Supreme Court of Missouri. The United States Supreme Court, in an opinion by Mr. Justice Brennan, reversed, holding that there were sufficient facts from which "the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did." (352 US, at p. 503).

It will be recalled that the statute imposes liability on the railroad if the injuries resulted "in whole or *in part*" from the negligence of the railroad. This expression, "in part" is emphasized in the *Rogers* opinion in the following language (352 US at p. 506-507):

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury

in made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence."

The italics are those of the Court.

And further (352 US at p. 507-509):

"The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practial purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, *however small*, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, *even though entirely circumstantial*, from which the jury may with reason make that inference.

"The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether the fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence. Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. That was because the courts

developed concepts of assumption of risk and of the coverage of the law, which defeated employee claims as a matter of law. Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases—whether employer fault played *any part*, in the employee's mishap." (Emphasis Supplied).

In the case at bar, the proofs adduced on behalf of the petitioner showed that the logical place in which petitioner would eat his lunch would be the air house which was the scene of this accident. All other places were clearly less desirable. Certainly it was relevant that there were roaches in the locker room and storehouse which necessitated the men having to hang their lunch pails upon wires to keep the roaches out of their lunches. We submit it was error for the court to exclude the jury from hearing this testimony, and it would especially appear that this testimony should have been considered by the court, in view of the evidence showing the undesirability of eating out of doors and the practical impossibility of eating at the restaurant and getting back to work on time in the short 30 minutes which were allotted for lunch.

In any event, the Railroad had knowledge that the men ate in the air house, that there were not enough chairs which caused some of the men to have to sit on the floor to eat their lunch, and that these conditions had existed for a period of at least several years prior to the accident. Under the *Rogers* case, and the other cases hereinafter discussed, it is submitted that a *prima facie* case was made

of the Railroad's negligence in failing to supply an adequate number of chairs in the air house. With not enough chairs for the men to eat lunch on and only 30 minutes time in which they could eat their lunch, it was for the jury to say whether the negligence of the Railroad, "however small" "played any part at all" (to use the language of the *Rogers* case) in petitioner's mishap.

The evidence in this case on behalf of the plaintiff much more strongly makes out a *prima facie* case of negligence on the part of the Railroad than the proof on behalf of the petitioner which appear in many of the reported cases decided since the *Rogers* case by both the United States Supreme Court and other appellate courts.

Among the cases holding that the evidence on behalf of the petitioner required the trial court to allow the jury to determine the case are the following:

Ringhiser v. *C. & O. Ry. Co.*, 354 US 901, 77 S Ct 1093, 1 L ed 1268 reversed by *per curiam* opinion lower court decision in favor of the railroad. In that case plaintiff felt a call of nature and was using a gondola car as a toilet when the gondola car was struck by other railroad cars, causing steel plates to shift and strike the plaintiff. Even under this bizarre factual situation the United States Supreme Court held that the lower court had erred in not permitting the jury to decide whether the railroad was guilty of negligence which contributed to the plaintiff's injuries.

In *Thomson* v. *Texas & Pacific Ry. Co.*, 353 US 926, 77 S Ct 698, 1 L ed 2d 722, reversing *per curiam* the opinion of the lower court, 232 F. 2d 313, a recovery was sustained where a female employee was injured lifting mail

sacks even though on the particular day involved there apparently was no protest or request for assistance, the theory supporting recovery apparently being that plaintiff was negligently assigned to a job too physically difficult for her.

In *Davis v. Virginian Railway Co.*, 361 US 354, 80 S Ct 387, 4 L ed 366, the plaintiff railroad employee was engaged in shifting various railroad cars for his employer when he had to descend from the top of a box car by means of a ladder on the box car. He slipped on the ladder and fell to the ground. The trial court struck the evidence, and this Court denied a writ of error to plaintiff. In reversing and remanding the case, Mr. Justice Clark wrote for the Court that, "Since petitioner was instructed to perform the task in 30 minutes, it was necessary for him to work faster than he normally would." The opinion further noted that neither of the brakemen who were assisting plaintiff were experienced in this particular operation.

The dissenting opinion of Mr. Justice Harlan notes that: "The record is barren of anything showing why this accident occurred" and "More especially, petitioner did not say that he fell because he was 'rushed'." Yet, the majority of the Court held:

> "We think it should have been left to the jury to decide whether the respondent's direction to complete the spotting operation within 30 minutes, plus the inexperience of the brakemen assigned to perform this 'hot job,' might have precipitated petitioner's injury."

It should here be noted that the allotted time for lunch in the case at bar was 30 minutes, the same period of

time allowed for the plaintiff in the *Davis* case to complete the switching operation, a fact heavily relied on in that opinion.

The above cases are typical of many which could be cited. For a complete list of citations of cases decided by the United States Supreme Court from January 31, 1949 to October 19, 1959 where lower courts had either withheld the case from the jury or set aside a jury verdict for the plaintiff employee and where the United States Supreme Court reversed, see the concurring opinion of Mr. Justice Douglas in *Harris* v. *Pennsylvania Railroad Co.*, 361 US 15, 80 S Ct 22, 4 L ed 366.

It is worthy of note that the Congress has not amended the FELA since 1939 and we therefore submit that it is a reasonable inference that the Congress has thereby concurred in the interpretations of this Act by the United States Supreme Court.

In conclusion, we submit that, under the authorities cited above, it was for the jury to determine whether the Railroad was guilty of *any* negligence in not foreseeing that due to the lack of seating space and the short time in which the men had to eat their lunch that one of the men might have a chair or bench pulled out from under him. And the result would be the same even if petitioner engaged in a scuffle for the chair as Coleman claimed, because contributory negligence on the part of petitioner would only lessen his damages and not be a bar to recovery. 45 USCA Sec. 53.

Petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Appeals of Virginia.

LOUIS B. FINE and
HOWARD I. LEGUM
Attorneys for Petitioner

FINE, FINE, LEGUM & SCHWAN
720 Law Building
Norfolk 10, Virginia

Of Counsel

APPENDIX

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 11th day of January, 1961.

The petition of John R. Rogers for a writ of error to judgments rendered by the Court of Law and Chancery of the City of Norfolk on August 9, 1960, and August 10, 1960, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Norfolk and Western Railway Company and another were defendants, having been maturely considered and a transcript of the record of the judgments aforesaid seen and inspected, the court being of opinion that the said judgments are plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgments of the said Court of Law and Chancery.

A copy, Teste:

Clerk

FILED
MAR 22 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 766

JOHN R. ROGERS,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS R. MCNAMARA
WILLIAMS, COCKE, WORRELL & KELLY
1200 Maritime Tower
Norfolk 10, Virginia
Counsel for Respondent.

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STATEMENT OF THE CASE DEEMED NECESSARY

Plaintiff's case was based upon two theories: (1) Respondeat Superior, under which he sought to hold the defendant company liable for the act of one of its employees, the co-defendant Coleman, in allegedly intentionally pulling a bench out from under plaintiff causing him to fall to the floor and sustain injuries; and (2) Direct Negligence, under which he sought recovery on the

proposition that the defendant company was negligent in not providing one of its work shops with sufficient accommodations to be used as a lunch room and that its failure to do so was a contributing cause of injuries inflicted upon one employee by another in a physical contest over the use of one bench.

Without further reference to the record it is sufficiently shown from the Petition that the evidence established the following controlling facts:

1. That the motivation for the alleged tort was purely personal. (Petition 7-8).

2. That the alleged tort was committed in violation of express rules of the company prohibiting such conduct. (Petition 8).

3. That the incident occurred in a work shop of the defendant company, the voluntary use of which for lunch and relaxation during the lunch period had merely been tolerated by defendant. (Petition 5-6).

4. That subsequent to the entry of summary judgment for the defendant company, which occurred at the conclusion of the plaintiff's evidence, the court overruled a similar motion of defendant Coleman and after receiving his evidence submitted the issues between these parties to the jury. The finding of the jury in favor of the defendant Coleman settled in his favor all matters in controversy between them. Petitioner has now abandoned his claim against Coleman and the judgment in this respect has become final.

ARGUMENT

The trial court's action in striking plaintiff's evidence at the conclusion of his case necessarily incorporated rulings as a matter of law that no jury issue had been made out on either of plaintiff's theories. Its action under the evidence before it was inevitable.

I. No Jury Issue Under Respondeat Superior Theory.

That there could be no recovery based on Respondeat Superior was an unavoidable conclusion in view of the admitted facts that under plaintiff's theory of the case a fellow employee had committed against him an intentional tort not in the course of his employment and not in furtherance of the company's business, but from a purely personal motivation. There is no recovery under The Federal Employees Liability Act in this event. *Davis* v. *Green*, 260 U.S. 349, 43 S. Ct. 123 (1922); *Jamison* v. *Encarnation*, 281 U. S. 635, 50 S. Ct. 440 (1930); *Hoyt* v. *Thompson*, 174 F. (2d) 284 (C.A. 7th, 1949).

Furthermore, this point has now become moot since the jury by its verdict has exonerated the co-employee from the charges which form the basis now urged as a grounds of recovery under the theory of Respondeat Superior.

II. No Jury Issue Under Direct Negligence Theory.

It is equally conclusive that no jury verdict could have been based on the evidence under any theory of direct negligence. Such evidence must justify with reason a con-

clusion that the employee was injured as a result, at least in part, of his company's negligence in exposing him to reasonably foreseeable danger from a fellow employee of dangerous propensities, or otherwise, *St. Louis–S. F. R. Co. v. Mills*, 271 U.S. 344, 46 S. Ct. 520 (1926).

There was no basis in the evidence for any inference that defendant Coleman was a man of dangerous propensities. Petitioner does not question this fact, but accepts the contrary conclusion admitting on pages 7-8 of Petition that plaintiff: "had never had any trouble with Coleman before, or even had any words with him prior to the incident (Tr. 38). There had been no horseplay prior to Coleman's pulling the stool from under him (Tr. 61). He ate lunch in the air house with Coleman most of the time (Tr. 132)."

Nevertheless, Petitioner argues that the jury would have been justified in concluding that plaintiff's injuries were attributable to negligence on the part of the defendant company in other respects. His contention is summarized in Petition page 23 as follows:

> "In conclusion, we submit that, under the authorities cited above, it was for the jury to determine whether the Railroad was guilty of any negligence in not foreseeing that due to the lack of seating space and the short time in which the men had to eat their lunch that one of the men might have a chair or bench pulled out from under him."

To reach this conclusion, Petitioner reasons that since the company knew that some of its employees chose to spend their lunch period in the air house, the duty arose to convert this work shop into an adequate lunch room and that failure to do so was a proximate cause of an injury

subsequently sustained in a contest between employees over one seat. No authority is cited for existence of any such duty nor any recognizable causal connection between its alleged violation and injuries inflicted by an intentional tort of the sort alleged in the case at bar. On the contrary, it is well settled that no recovery is possible under the F. E. L. A., under the direct negligence theory, for injuries suffered from an intentional tort of a fellow employee in the absence of evidence (1) that such employee was hired or retained by his employer with reason to know of his dangerous propensities, and (2) that the injury complained of was caused by such dangerous person in the course of his employment—i.e. not from purely personal motives. *Atlantic Coast Line R. Co.* v. *Southwell*, 275 U. S. 64, 48 S. Ct. 25 (1927); *Sheaf* v. *Minneapolis St. P. & S. S. M. R. Co.*, 162 F. (2d) 110 (C. A. 8th, 1947). The evidence of plaintiff himself having negatived any inference of these essential factors, no choice was left to the trial court but to rule summarily that no *prima facie* case had been made out of this theory.

CONCLUSION

The evidence of plaintiff himself having precluded any inference of the existence of those factors essential to recovery in the case at bar and having established concretely the existence of facts which negatived any such inference, there was no evidence upon which a verdict for plaintiff could stand. It is submitted that the action of the Virginia courts was clearly correct and no purpose

would be served by the writ requested. The Petition should thus be denied.

Respectfully submitted,

NORFOLK AND WESTERN RAILWAY COMPANY

BY THOMAS R. MCNAMARA
Of Counsel

THOMAS R. MCNAMARA
WILLIAMS, COCKE, WORRELL & KELLY
1200 Maritime Tower
Norfolk 10, Virginia